

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEJON EUGENE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 17, 2004

No. 246340

Wayne Circuit Court

LC No. 01-011301-02

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530, and assault with intent to do great bodily harm, MCL 750.84. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 15 to 22½ years for the unarmed robbery conviction, and to ten to fifteen years for the assault conviction. Defendant appeals as of right, challenging only his sentences. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and Kabushi Salter operated a drug house that brought in \$20,000 to \$40,000 a month. On the morning of February 25, 2001, Melvin Woods and Betty Beck were beaten at this house. Beck subsequently died from her injuries. Salter, who had previously pleaded guilty to second-degree murder relative to Beck, testified that defendant was not involved in the beatings. Defendant similarly testified. However, Woods testified that defendant hit him with a baseball bat. Another witness testified that before the beatings, she heard defendant and Salter discussing Beck's purchase of drugs at the house next door and the fact that she owed the dealers money. This witness also testified that while Salter was beating Beck with a baseball bat, defendant was standing nearby, laughing.

Defendant argues that the trial court impermissibly departed upwards from the guidelines based on the determination that he was running a drug house and, even though he was acquitted of her murder, "participated in some form or fashion" in the death of Betty Beck. Further, defendant asserts that bragging about being the head of a drug house and laughing while Beck was being savagely beaten are "neither substantial and compelling nor objective and verifiable reasons for departure." Further, defendant claims that the departure was subjective and emotionally driven given the trial court's acknowledged concern with his operation of the drug house and stated business practice of giving away free samples of cocaine to get customers hooked.

Under the statutory sentencing guidelines, MCL 777.1 *et seq.*, the trial court must impose a sentence within the guidelines range unless there is a “substantial and compelling” reason for departure. A “substantial and compelling” reason is an objective and verifiable reason that keenly or irresistibly grabs the Court’s attention, is of considerable worth in deciding the length of sentence, and exists only in exceptional cases. *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003). The existence of a particular factor justifying departure is a factual determination reviewed for clear error, the determination that a factor is objective and verifiable is to be reviewed de novo, and the determination that objective and verifiable factors constitute substantial and compelling reasons to depart is reviewed for an abuse of discretion. *Id.* at 264-265. In this context, an abuse of discretion means that where there is more than one reasonable and principled outcome and “the trial court selects one of these principled outcomes, the trial court has not abused its discretion and thus, it is proper for the reviewing court to defer to the trial court’s judgment.” *Id.* at 269.

The trial court’s primary reason for the departure was the severity of the beatings. The degree of injury may constitute a substantial and compelling reason. *People v Lowery*, 258 Mich App 167, 171; 673 NW2d 107 (2003). This factor was objective and verifiable, and keenly and irresistibly grabs our attention. There was testimony regarding repeated beatings with a baseball bat and hearing bones crack. While death or injury might be accounted for in the guidelines, this degree of brutality was not taken into consideration and is exceptional.

Defendant asserts that since he was acquitted of the charges involving Beck, her beating should not be considered. However, while there was no testimony that defendant struck Beck, there was evidence that he was present, encouraged the beating, and was laughing. Thus, his acquittal of her murder would not preclude weighing his involvement in fashioning a sentence. Moreover, even though he was not charged with a drug offense, defendant admitted operating a drug house by which he earned up to \$40,000 a month and, as the trial court noted, he even bragged about it. Thus, this factor was objective and verifiable, and exceptional. There was no abuse of discretion in the determination that this was a substantial and compelling reason where the beatings were related to the operation of the drug house.

Affirmed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray